In the Supreme Court of the United States

October Term, 1969

No._____

YAKIMA TRIBAL COURT, *Petitioner,*

vs.

ALVIN SETTLER, *Respondent.*

WILSON LAMEER, Chief of Police,
WILLIAM YALLUP, Chief Judge,
Yakima Tribal Court, *Petitioner,*

vs.

ALVIN SETTLER, *Respondent.*

WILSON LAMEER, Chief of Police,
WILLIAM YALLUP, Chief Judge,
Yakima Tribal Court, *Petitioner,*

vs.

MARY SETTLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel for Petitioner
JAMES B. HOVIS
P. O. Box 437
Yakima, Washington

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WILSON LAMEER, Chief of Police,
WILLIAM YALLUP, Chief Judge,
Yakima Tribal Court,
Petitioner,

vs.

MARY SETTLER,
Respondent.

Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 22, 1969.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. 23. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 11, 12, is reported in ___F.2d___.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 22, 1969 (Appendix B, *infra*, p. 11, 21). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTION PRESENTED

Whether the privilege of the writ of habeas corpus is available in Federal Court to a Yakima Indian convicted in Tribal Court of violation of Tribal Fishing regulations while the party seeking the writ is free on bail pending Tribal Court appellate review.

STATUTES INVOLVED

The statutory provisions involved are: 28 U.S.C. Section 2241(c) (1948): 28 U.S.C. 2243 (1948); 25 U.S.C. 1303 (1969). They are printed in Appendix A, *infra* pp.

STATEMENT OF THE CASE

Respondents are each members of the Yakima Indian Nation convicted in that Nation's Tribal Court of violating tribal fishing regulations. Petitioners ap-

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pealed in the manner provided by the Tribal Law and Order Code and pending hearing on their appeal were free on bail. While thus free and before any hearing could be had on the appeals the petitioners sought a writ of habeas corpus in the Federal District Court, Eastern Division of Washington, Southern Division. The District Court refused to issue the writ giving as reasons: no jurisdiction over an internal tribal matter; the petitioners were not in custody so the writ was not a proper remedy; and the request for the writ was premature in that tribal appellate rights had not been exhausted.

Respondents appealed to the United States Court of Appeals for the Ninth Circuit which reversed the District Court ruling in each instance. Jurisdiction on appeal was grounded on 28 U.S.C. §1294 (1964).

The sovereign body, whose Tribal Court is petitioner, is the Confederated Tribes and Bands of the Yakima Indian Nation. This Indian Nation was recognized and established in 1855 by treaty between Indian leaders and the United States of America (12 Stat. 951). Those Indians which formed the nation designated as "Yakima" ceded and relinquished certain lands to the United States, but reserved lands and fisheries within and without the exterior boundaries of the Yakima Indian Reservation for their use.

A tribal government has continued since that time and a Court system has long been established. The Yakima Tribal Court is the judicial branch of the Yakima

Nation, a sovereign nation. This Court is financially independent of the Government of the United States and is supported wholly by the enrollees of the Nation, and its judges and other personnel are officials and employees of the Yakima Nation. The Yakima Nation, which is not a tribe formed under the Indian Reorganization Act, has its own Law and Order Code and has under said Code promulgated certain rules and regulations concerning the special fishing privileges bargained for and reserved by treaty.

It was these rules that respondents violated. Respondents were cited and convicted in the Tribal Court for these violations. After a sentence of a fine was imposed, the respondents appealed. Before respondents perfected their appeals, and while they were still pending, respondents filed their petitions for writ of habeas corpus in the United States District Court. The respondents at the time of filing their petitions were not and are not now in custody.

REASONS FOR GRANTING THE WRIT

The Federal Congress has by virtue of the Indian Civil Rights Bill of 1968, 25 U.S.C.A. Section 1303 (Supp. 1969) created for an Indian convicted of a crime in Tribal Court, a right to seek a writ of habeas corpus in Federal Court. Prior to this enactment no jurisdictional authority existed for Federal Courts to issue such writs with the single exception of *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965). No review

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of *Colliflower* was sought. However, even if the jurisdictional precedent of *Colliflower* is upheld the case is not authority at bar because of the fundamental difference between the Tribal Court in *Colliflower*, which was found to be an arm of the Federal Government, and the Tribal Court at bar which is in no sense a Federal arm. Moreover, in *Colliflower* the party sought a writ of habeas corpus directed to a county sheriff in the State of Montana who had her in his jail. At bar respondents are free on bail pending appellate review within the Tribal Court system.

In directing that the writ of habeas corpus issue in the cases at bar the Ninth Circuit approves a procedural approach to review of Tribal Court cases not contemplated by Congress and not permitted in any other situation.

Fundamental procedural questions thus lie at the heart of these cases. Petitioners have failed to pursue their appellate rights within the Tribal Court system. They have attempted prematurely to substitute habeas corpus proceedings for normal appellate review or writ of error. To permit this procedure strikes at the very heart of the tribal appellate system of this sovereign nation.

Moreover, the petitioners are not in custody or detained. They are free on bail pending tribal appellate review. No significant restraints on the petitioners freedom have been imposed. That the privilege of the writ of habeas corpus is not available absent significant

restrictions on the applicant's freedom has long been the law recognized by the Federal Courts[1] and no reasons have been presented to justify a variance therefrom at bar.

The scope of the availability of the writ has thus been enlarged far beyond that contemplated by the Federal Congress both in procedure and in substance. The Ninth Circuit has made the "privilege" of the writ available to extra-detention situations not intended by Congress.

The Tribal Courts and individual Indians whose rights, duties and obligations are affected directly by the Indian Civil Rights Bill of 1968 are vast in number and location across the land. The effect of the judgment of the Court of Appeals here sought to be reviewed directly affects each of these courts and each of these Indians. The total absence of procedural guidelines created by the opinion coupled with the gross extension of the availability of the habeas corpus writ beyond anything contemplated by the Congress demands the immediate attention of the highest Court for correction in the interest of the orderly administration of justice in Indian Tribal Courts.

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[1]Some cases illustrating the requirements of the existence of significant restraints are: *Allen v. United States*, 349 F.2d 362 (1st Cir. 1965); *Shelton v. United States*, 242 F.2d 101 (5th Cir. 1957); *United States v. Harris*, 155 F. Supp. 117 (DCSD Calif. 1957); *Rowland v. State of Arkansas*, 179 F.2d 709 (8th Cir. 1950), *certiorari denied*, 339 U. S. 952; and *Johnson v. Hoy*, 227 U. S. 245 (1913).

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CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES B. HOVIS
Counsel for Petitioners

Dated March 18, 1970.

APPENDIX "A"

STATUTORY PROVISIONS

28 U.S.C. 2241(c) (1948)

§ 2241. Power to grant writ

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §112, 63 Stat. 105.

28 U.S.C. 2248 (1948)

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application

for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. June 25, 1948, c. 646, 62 Stat. 965.

25 U.S.C 1303 (1968)

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. Pub. L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.

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APPENDIX "B"

Opinions of the court below:

United States Court of Appeals
For the Ninth Circuit

ALVIN SETTLER,
Appellant,
vs.
YAKIMA TRIBAL COURT,
Appellee.
No. 22,815

[December 22, 1969]

Appeal from the United States District Court
for the Eastern District of Washington

Before: BARNES, ELY AND HUFSTEDLER, Circuit Judges

BARNES, Circuit Judge:

Alvin Settler seeks review of a decision of the United State District Court for the Eastern District of Washington dismissing his petition for a writ of habeas corpus. Appellant based his petition on the authority conferred by 28 U.S.C. § 2241 (1964).[1]

[1]Section 2241(c), the subsection in question here,reads as follows:
"(c) The writ of habeas corpus shall not extend to a prisoner unless—
"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
"(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemp-

tion claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

"(5) It is necessary to bring him into court to testify or for trial."

The jurisdiction of this court on appeal is grounded on 28 U.S.C. § 1294 (1964). Appellee's motion to dismiss this appeal has been quashed.[2]

This case involves the important question of whether, in a case arising before the effective date of the Indian Civil Rights Bill of 1968, 25 U.S.C.A. § 1301 *et seq.* (Supp. 1969), a federal district court has jurisdiction to hear a petition for a writ of habeas corpus from one convicted by a Yakima Indian Tribal Court.

Appellant, an American Citizen and a member of the Confederated Tribes and Bands of the Yakima Indian Nation, was convicted on September 29, 1967 by the Yakima Tribal Court of twice violating off-reservation Indian Tribal Fishing Regulations (causes #11316 and 11358) and once disobeying the lawful orders of the Indian Tribal Court relating to off-reservation fishing regulations (cause #11336). He was sentenced as follows: (#11316) $80.00 plus $2.50 court costs or a thirty-day suspension from any fishing activities;

[2]Appellee moved to dismiss this appeal on the grounds that petitioner failed to (1) file a supersedeas bond, (2) file a full transcript of proceedings or statement of issues, and (3) docket the appeal within 40 days from the filing of the notice of appeal. Each of the aforementioned rule discrepancies, however, can be traced directly to appellant's financial problems rather than to procrastination, and there has been no demonstration of recognizable harm to appellee. Furthermore, appellant has taken satisfactory steps to correct the discrepancies. Thus, recognizing the scope of our discretion in this matter, *Hagan v. Whitman*, 356 F.2d 742, 745 (9th Cir. 1966), we have denied the motion.

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(#11336) $50.00 and $2.50 costs or 30 days; (#11358) $120.00 and $2.50 costs or 90 days.

Appellant then appealed to a tribal appellate court and posted a bond pending appeal. Before he perfected that appeal and while it was still pending, however, appellant petitioned the federal district court for a writ of habeas corpus, claiming that the tribal court proceedings were in violation of his Fifth and Sixth Amendment rights. In dismissing that petition, the court reasoned that it had no jurisdiction over the subject matter or to hear the petition since a treaty, ratified on March 8, 1859, between the United States and the Yakima Indian Nation conferred on that Indian Nation exclusive jurisdiction of the fishing rights delineated in the treaty.[3]

The contentions advanced by appellant herein are twofold. First, he claims that the case of *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), is controlling. In *Colliflower* this court held a federal district court has jurisdiction to issue a writ of habeas corpus for the purpose of determining the validity of detention of an Indian convicted of criminal trespass by the Tribal Court of the Fort Belknap Indian Community. Second, he claims that although the Treaty of 1859 gives the

[3]A pertinent part of the document, page 953, paragraph 1, reads as follows:

> "The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . ."

Yakima Nation the right to take fish at "all usual and accustomed places" off the Indian Reservation, it does not confer upon that Nation exclusive jurisdiction to regulate such fishing so as to divest a federal district court of subject-matter jurisdiction where it is claimed that the scope and procedural means of regulation were violative of the federal Constitution.

Appellee contests this appeal on four primary ground, none of which have merit.

I.

The first ground is that relied upon by the district court: A federal district court has no jurisdiction to entertain a petition for writ of habeas corpus respecting internal tribal matters. Appellees claim that unless Congress has established restraints on Indian self government (as it did in the Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1301 *et seq.* (Supp. 1969), the tribe retains sovereign authority over its internal affairs and thereby exercises final authority. They claim that regulation of Indian fishing is such an internal affair. Furthermore, they would distinguish the *Colliflower* case as follows: (1) *Colliflower* involved prosecution of an Indian for criminal trespass rather than for an "internal matter" such as regulation of fishing; and (2) *Colliflower* turned on the fact that the Fort Belknap Indian Tribal Court functioned in part as a federal agency, whereas the Yakima Tribal Court does not function as such. They make the latter distinction on the basis that the Fort Belknap Courts were federally

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funded (a specific finding of the *Colliflower* court), while the Yakima Courts are not.

We concede that as a general rule the regulation of Indian fishing is an internal affair of the Yakima Nation under the authority of the Treaty of 1859. The Indian Nation has exclusive authority to regulate the time, place and manner of Indian fishing on the reservation (just as the several states have exclusive authority to exercise the police power) in the absence of the exercise of paramount authority by the United States. The very definition, however, indicates that the Indians' exclusive authority is not boundless. The attempt by a state to prosecute its citizens in a summary and arbitrary fashion may be successfully attacked, as may an attempt to regulate certain activities of its domiciliaries without the state. Likewise (without expressing any opinion on the merits of the constitutional issues in the present case), although the Fourteenth Amendment may not apply to tribal courts, there must be and is a limit to the "exclusive" authority of the Yakima Nation to regulate Indian fishing when that regulation becomes so summary and arbitrary as to shock the conscience of the federal court, or goes beyond the scope of authority originally contemplated by the Treaty of 1859. *Colliflower* involved review of a criminal prosecution for trespass, and trespass by an Indian upon another Indian's land within the reservation might be said to be an "internal affair" of the Indian Nation. Yet this court held that there was room for review. We

see no basis for distinguishing the present criminal prosecution for violation of a fishing regulation from the *Colliflower* criminal trespass prosecution. Neither species of regulation concerns affairs so "internal" that an Indian prosecuted for violation of such a regulation should be prohibited from testing the jurisdiction of the tribal court, or be denied a fair hearing in tribal courts.

Appellee's contention that *Colliflower* is distinguishable because the Yakima Tribal Courts are not federally funded, is unconvincing. On the one hand, the Yakima Tribal Courts are not actually financially independent from the federal government. The Yakima Nation court system and laws, according to appellant's counsel, cannot be modified without the consent of the federal government; thus, the officials who have final authority to approve or reject legal changes are paid by the federal government. On the other hand, our reading of the *Colliflower* case is that federal funding of the Fort Belknap Tribal Courts was merely one factor considered in finding that such courts were at least in part a federal agency. More important in the *Colliflower* determination was the historical origin of the tribal courts and their scope of authority. (See 342 F.2d at 379).

Analysis reveals that the Yakima Courts have developed in part as a federal agency similar to the Fort Belknap courts. The tribal courts in either case were organized pursuant to the executive order of the Secretary of the Interior of April 10, 1883 and approved by

Congress in an Appropriation Act in 1888, 25 Stat. 217. The parties here assure us that the Yakima Courts still exist under this authority. *Compare Colloflower v. Garland, supra,* at 372-374 *with* Reply Brief for Appellant at p. 3, *Settler v. Yakima* Tribal Court, No. 22,815, *and* Brief for Appellee at p. 7, id. The courts so organized were contemporaneously described as ". . . mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." *United States v. Clapox,* 35 F. 575, 577 (D. Ore. 1888). Furthermore, the Yakima Law and Order code has been taken almost verbatim from the regulations of the Bureau of Indian Affairs, 25 C.F.R. § 11.1 *et seq.*, as was the Fort Belknap Law and Order Code. Thus, when we consider the previously mentioned inability of the Yakima Courts to make legal changes without approval by the federal government, we cannot accept appellee's contention that *Colliflower* is distinguishable in any significant way from the present case.

II.

The second point pressed by appellee is that this case should be dismissed even if the district court has jurisdiction since habeas corpus is not available to a petitioner who is not "in custody" within the meaning of 28 U.S.C. §2241. We believe, however, that the writ of habeas corpus is available to one who, like appellant,

has been fined by an Indian Tribal Court and has posted a bond pending procedural review by an Indian appellate court. (Note that we deal (*infra*, IV.) with the exhaustion of remedies issue.) Appellee cites no case directly supporting its position. In fact, in the most recent case cited, *Jones v. Cunningham*, 371 U.S. 236 (1963), the Supreme Court held that a prisoner placed on parole is "in custody" within the meaning of 28 U.S.C. § 2241 so as to give him sufficient standing to request habeas corpus. The Court noted in its analysis that "[h]istory, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Id.* at 240; *see, e.g., Brownell v. Tom We Shung*, 352 U.S. 180, 183 (1953) (habeas corpus available to an alien seeking entry into the United States even though he is free to go anywhere else in the world); *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952) (habeas corpus appropriate procedural vehicle for testing legality of induction into the military); *Ford v. Ford*, 371 U.S. 187 (1962) (habeas corpus available to parents disputing proper custody of child).

The availability of habeas corpus appears particularly appropriate where the petitioner, although not held presently in physical custody, has no other procedural recourse for effective judicial review of the constitutional issues he raises. That is the predicament faced

by the appellant here; if habeas corpus is not available, the Yakima Indian Nation can conceivably avoid the imposition of any due process safeguards merely by rendering fines rather than prison sentences.[4]

III.

Appellee's third point is that the Yakima Tribal Court is not a "person" to whom an application for a writ of habeas corpus can be directed. The appropriate section of the United States Code provides that "the writ shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243 (1964). Appellee argues that the Tribal Court is not appellant's custodian. We think it appropriate in this case, however, since there was and is no actual physical custodian (as was true in *Jones v. Cunningham, supra*), that appellant has named as a respondent the court which imposed the fine and to which the bond was paid pending appeal. It is that court (or the person heading or acting for that group) as much or more than any other possible party, that is responsible for the alleged unconstitutional deprivation of appellant's liberty. In view of our disposition of this appeal, we leave to the district court the naming of the precise individual who heads, or otherwise is in a position to act for, the Tribal Court, or if that person cannot be ascertained, the naming of all the individual members of that court.

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[4]*Cf. Bryson v. United States,* .....U.S....., decided December 8, 1969, n. 4.

IV.

The final point pressed by appellee is that this case should be dismissed because appellant did not exhaust his available remedies—appellate review by a tribal court. This contention must also be rejected since an Indian appellate tribunal has no power to reverse the decision of the tribal court on the grounds urged by appellant: It has no power to declare portions of the Yakima Tribal Code unconstitutional by federal standards nor authority to determine the ultimate jurisdictional scope of the lower tribal court. *See* United States Constitution, Art III, § 1. And see *Colliflower v. Garland, supra,* where there was no indication by this court that tribal appellate review is a prerequisite for standing to challenge by way of federal habeas corpus a tribal court conviction.

Thus, we hold that the district court erred in concluding that it had no jurisdiction to hear appellant's petition. Without expressing any opinion on the merits of the constitutional issues raised by appellant, we vacate the dismissal below and remand for further proceedings in the district court.

United States Court of Appeals
For the Ninth Circuit

ALVIN SETTLER,
Appellant,
vs.
WILSON LAMEER, Chief of Police,
WILLIAM YALLUP, Chief Judge,
Yakima Tribal Court,
Appellees.
No. 23,618

MARY SETTLER,
Appellant,
vs.
WILSON LAMEER, Chief of Police,
WILLIAM YALLUP, Chief Judge,
Yakima Tribal Court,
Appellees.
No. 23,619

[December 22, 1969]

Appeals from the United States District Court
for the Eastern District of Washington

Before: BARNES, ELY AND HUFSTEDLER, Circuit Judges

PER CURIAM:

These are appeals pursuant to 28 U.S.C. § 1294 (1964) from orders of the United States District Court for the Eastern District of Washington denying each appellants' request for issuance of an order to show cause requiring appellees, as Chief of Police and Chief Judge of the Yakima Indian Tribal Court wherein appellants were convicted in August of 1968, to deliver petitioners to district court for an evidentiary hearing on appellants' petitions for writs of habeas corpus. The

district court reasoned that since appellants were free on bail, appellees could not be directed to produce appellants before the court for any purpose. *Settler v. Lameer*, Docket No. 2454 (E.D. Wash., filed Sept. 11, 1968).

Congress passed the Indian Civil Rights Bill in 1968. 25 U.S.C.A. § 1301 *et seq.* (Supp. 1969). Section 1303 of that bill states:

> "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe."

At oral argument before this court the parties agreed that in light of section 1303, the district court has jurisdiction to entertain the petitions in question. They agreed further that these matters should be remanded to the District court for a hearing on the merits. We endorse this agreement. Compare the companion opinion in *Settler v. Yakima Tribal Court*, No. 22,815, where we hold that before the effective date of the Indian Civil Rights Bill, habeas corpus was available as a device to obtain review of decisions of the Yakima Tribal court even where the one convicted was fined rather than given a prison sentence.

We thus reverse the district court's denial to issue show cause orders, and remand for an evidentiary hearing on the merits of the petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

ALVIN SETTLER, *Petitioner*,
vs.
YAKIMA TRIBAL COURT, *Respondent*.

No. 2378
MEMORANDUM DECISION

About 113 years ago, a group met in the Walla Walla Valley at a place called Camp Stevens. Some were called Indians and others white men, and, for the sake of brevity, will be referred to as red brother and white brother. The head white brother, a man named Stevens, talked to the head red brother, a man named Kamaiakun, and after due deliberation, presented the head red brother with a piece of paper and asked him to make his mark on the paper, and that he would fill in the blank spaces later. Kamaiakun assented. It appears that he could neither read, write nor speak the English language. Communications were by interpreter. This piece of paper was described as a treaty, ratified by the Senate of the United States on March 8, 1859, and proclaimed by the President of the United States on April 18, 1859. After the blank spaces were filled in, it was provided that those who were represented by red brother, including delegates from a number of Indian tribes named in the treaty, would be considered as one "nation." 12 Stat. 951. The name of the nation was "Yakima," and the Yakimas ceded and relinquished certain

lands to the United States, but reserved from the ceded lands for their own use what is now known as the Yakima Indian Reservation. One pertinent part of this document appears at page 953, paragraph 1. It says:

> "The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

This is the only instance wherein any special right was mentioned as reserved to the Indians. There are some interesting statements concerning the management of the tribal affairs that include a reference to the payment of the head chief who will be called upon to perform many services of a public character. This appears on page 953, paragraph 5. No reference is made to a court system.

In the report of the Commissioner of Indian Affairs, J. D. C. Atkins, Commissioner, R. H. Milroy, Agent, for the year 1883, Mr. Milroy established a form of government for the Indians on the Yakima Reservation that included a court system. He first appointed three judges, five justices of the peace, a clerk, a prosecuting attorney for the court, and the necessary policemen to insure that the court had business.

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In special cases, he changed, amended and occasionally made new laws to suit the difference between the Indian and the white man. One of these new laws was the institution of the whipping post for wife-beating. He reports that this effectively stopped the Indians from engaging in this "barbaric custom", and included this comment, "would have a like effect among the whites if instituted among them."

In 1884, Milroy informed the Indians that they were to have a territorial election and elect the three judges and the clerk of the court. This is the historic beginning of the Tribal Court. It is now claimed and not controverted that the Tribal Court of the Yakimas is financially independent of the Government of the United States and is supported wholly by the enrollees of the nation.

The Yakima nation, by its Tribal Council, promulgated certain rules and regulations concerning the special fishing privileges bargained for in the treaty. It is common knowledge that these rules and regulations are for conservation purposes, and may or may not have been motivated by the attempt by the State of Washington to promulgate rules and regulations that the state claims are applicable to all people, white or Indians, fishing *off the reservation.*

Alvin Settler is an enrolled member of the Yakima Tribe, tribe being synonymous in this instance with the Yakima nation. He was arrested by a tribal officer and charged with fishing in violation of a tribal rule of

closure of certain areas, including the usual and accustomed places fished by the Yakimas. It is conceded that the alleged offense occurred off the reservation but at a "usual and accustomed" fishing place. Settler was hailed before the Tribal Court, tried and found guilty of the offense with which he was charged. He was fined for this violation. During the course of these proceedings, Settler requested that a professional attorney be permitted to act as his counsel before the Tribal Court. This request was denied pursuant to the Law and Order Code of the Yakima Nation, Section 8, Chapter 1:

> "Section 8 Professional Attorneys — Professional attorneys shall not appear in any proceeding before the Yakima Tribal Court unless rules of the court have been adopted as set forth in Section 4 of this Chapter prescribing conditions covering their admission and practice before the court. Every defendant shall have the right to have some member of the tribe, to represent him and in the event he has no such representation, a representative may be appointed by the judge. Any such person acting as a representative may not charge a fee of over Twenty-Five Dollars ($25.00) for services rendered the defendant in any one action unless a larger fee is approved by the court and must meet the following qualifications: A person shall be eligible to act as a representative for the defendant in the Yakima Tribal Court only if he (1) is a member of a tribe under the jurisdiction of said court; (2) has never been convicted of a felony, or within one (1) year then last past of a misdemeanor in any court. In cases where charges are made by a member of the tribe for services rendered in any action over and above those provided herein, the member charging said excessive fee shall be disqualified from represent-

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ing any defendant in the Yakima Tribal Court for a period of six (6) months from the date of the court order finding that an excessive fee was charged."

It is contended further, and not denied, that no member of the Yakima nation is a professional attorney, although many members of the nation, including both the petitioner and his brother, Homer Settler, have represented defendants before the Yakima Tribal Court.

The Court does not propose to discuss the merits of the controversy, but will decide the matter purely on the question of jurisdiction. The plaintiff cites *Colliflower v. Garland*, 342 F. 2d 369, in support of his contention that this Court has jurisdiction to hear his petition and decide it on its merits.

In that case, the Court was concerned with a petition of Mrs. Colliflower, a member of the Fort Belknap Indian Community, who contended that her conviction by the Tribal Court of disobedience of the Court's order for her failure to remove her cattle from land leased by another person was void. Mrs. Colliflower claimed that the United States District Court should issue the writ of habeas corpus which the Court declined to do on the ground that it lacked jurisdiction. The Circuit Court of Appeals for the Ninth Circuit held to the contrary. The Appellate Court reviewed the history of the Fort Belknap Indian Community, the establishment of its Tribal Court, and the previous decisions of the Supreme Court of the United States, and concluded that the United States District Court for the District of Mon-

tana did have jurisdiction to hear and determine the issues raised by the petition.

It is interesting to note that the opinion was limited to the Fort Belknap Indian Community, and at page 379, syllabus 8, the Court used this language:

> "[8] Under these circumstances, we think that these courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court. We confine our decision to the courts of the Fort Belknap reservation. The history of other Indian courts may call for a different ruling, a question which is not before us."

In that case, the Court found as a fact that the Tribal Court was supported by funds derived from the Government of the United States through its Bureau of Indian Affairs. In this respect, the Fort Belknap Tribal Court differs from the Tribal Court of the Yakima nation. In syllabus No. 9, the Court said:

> "[9] The writ of habeas corpus lies on behalf of anyone who is 'in custody under or by color of the authority of the United States' or 'in violation of the Constitution * * * of the United States.' (28 U.S.C. § 2241(c) (1) and (3). We think that this covers Mrs. Colliflower's case. (Cf. Elk v. Wilkins, 1884, 112 U.S. 94, 108, 5 S. Ct. 41, 28 L. Ed. 643).
>
> "It may well be that one hundred years ago it would have been held that a federal court lacked jurisdiction to issue a writ of habeas corpus at the instance of an Indian imprisoned in a tribal jail, pursuant to the judgment of a tribal court. We think, however, that the status of the Indians

today is such, and particularly that the history and status of the tribal court at the Fort Belknap Reservation is such, that we should uphold the jurisdiction of a federal court in this habeas corpus proceeding.

"We do not pass upon the merits of Mrs. Colliflower's claims, because the district court did not reach them. It does not follow from our decision that the tribal court must comply with every constitutional restriction that is applicable to federal or state courts. Nor does it follow that the Fourteenth Amendment applies to tribal courts at all; some of the cases cited above indicate that it does not. And the vestige of 'sovereignty' that the tribe retains and exercises through its Tribal Council and Tribal Courts may call for application of the principles applied in such cases as Territory of Hawaii v. Mankichi, 1903, 190 U.S. 197, 21-218, 23 S. Ct. 787, etc."

It is the opinion of this Court that there are several factors that distinguish this case from the *Colliflower case*. In the treaty, the exclusive right of taking fish is reserved to the Yakimas. This right is in no way related to the rights of United States citizenship. In fact, it is paramount to the rights of the citizens of the United States. Petitioner Settler is a citizen of the United States, but derives his right to fish as an enrolled member of the Yakima nation.

Webster defines a treaty as a contract in writing between two or more political authorities (as states or sovereigns) signed by representatives duly authorized usually ratified by the law-making authority of the state. In order to make the treaty, the Yakimas, consisting of the confederated tribes named in the instru-

ment, must have some semblance of sovereignty. This was recognized by the United States through its authorized representatives, and it is specifically set forth therein that

> "Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquouose, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Syiks, Ochechotes, Kah-milt,pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of 'Yakima,' with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them."

The contracting parties are referred to as the United States and "The Yakama" and other tribes "who, for the purpose of this treaty, are to be considered as one *nation.*"

The Court can only conclude from the language of the treaty, the peculiar status of the Yakima Tribal court, the fact that the specific right is delineated in the body of the treaty, and the use of the word nation when referring to the authorization of the signators, that it was intended to confer to the sovereign Yakima nation exclusive jurisdiction of the fishing rights set

forth in the body of the treaty, and that this last vestige of sovereignty should be preserved.

This Court, therefore, concludes that it has no jurisdiction to hear the petition.

DATED at Seattle, Washington, this 1st day of February, 1968.

WILLILAM N. GOODWIN
UNITED STATES DISTRICT JUDGE